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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

OKSANA BAIUL, an individual,)	Case No. CV 15-05163 DDP (MRWx)
)	
Plaintiff,)	
)	ORDER DENYING PLAINTIFF'S MOTION
v.)	TO REMAND
)	
NBC SPORTS, A DIVISION OF)	
NBCUNIVERSAL MEDIA, LLC, a)	
Delaware limited liability)	
company; ON ICE INC., a)	[Dkt. 30]
California corporation BARRY)	
MENDELSON, an individual,)	
)	
Defendants.)	
_____)	

Presently before the court is Plaintiff Oksana Baiul's Motion to Remand. Having considered the submissions of the parties, the court denies the motion and adopts the following Order.

I. BACKGROUND

The case arises from a dispute between Plaintiff, and Defendants, NBC Sports, On Ice, Inc., and Barry Mendelson. In her Complaint, Plaintiff alleges that Defendants converted and were unjustly enriched by Plaintiff's 1994 performance of "Nutcracker On Ice." (Compl. ¶ 1.) In December of 1994, Plaintiff performed "as the headliner of the touring ice show, 'Nutcracker On Ice' promoted

1 by Defendants On Ice, Inc. ("OII") and Barry Mendelson
2 ("Mendelson")." (Id. at ¶ 2.) This performance was recorded
3 pursuant to an agreement between OII and NBC Sports ("NBC"). (Id.)
4 According to Plaintiff, under this agreement, "NBC Sports agreed to
5 pay all production expenses associated with the Picture, including
6 'royalties' to Oksana 'pursuant to the 'performance agreement'
7 between Oksana, on the one hand, and OII and NBC Sports, on the
8 other hand." (Id. at ¶ 3.) However, Plaintiff claims that due to
9 "fraud or mistake" Oksana never entered into any "performance
10 agreement" with either OII or NBC. (Id.) Plaintiff further
11 contends that she has been paid no royalties from the performance.
12 (Id.) As a result of this failure, Plaintiff asserts that she is
13 entitled to "no less than \$10,000,000." (Id. at 6:20.)

14 Defendant NBC removed the action to this court. Plaintiff has
15 now moves to remand on the basis that "OII has not joined in the
16 removal." (Mot. Rem. at 18:3-4.) NBC contests the remand on the
17 grounds that "OII's consent to removal was not required because OII
18 is merely a 'nominal' party and plaintiffs failed to properly serve
19 OII." (Opp. Mot. Rem. at 10:5-6.)

20 **II. LEGAL STANDARD**

21 A defendant may remove a case from state court to federal
22 court if the case could have originally been filed in federal
23 court. 28 U.S.C. § 1441(a); see also Snow v. Ford Motor Co., 561
24 F.2d 787, 789 (9th Cir. 1977). As the removing party, Defendant
25 bears the burden of proving federal jurisdiction. Duncan v.
26 Stuetzle, 76 F.3d 1480, 1485 (9th Cir. 1996); see also Matheson v.
27 Progressive Specialty Ins. Co., 319 F.3d 1089, 1090 (9th Cir.
28 2003). The removal statute is strictly construed against removal

1 jurisdiction, and federal jurisdiction must be rejected if any
2 doubt exists as to the propriety of removal. Gaus v. Miles, Inc.,
3 980 F.2d 564, 566 (9th Cir. 1992) (explaining that courts resolve
4 doubts as to removability in favor of remand).

5 "After removal, a plaintiff may move to remand the action to
6 state court under 28 U.S.C. § 1447 for lack of federal jurisdiction
7 or procedural defects. The defendant bears the burden of
8 establishing federal jurisdiction and must 'overcome the strict
9 construction of the removal statute against removal.'" Johnson v.
10 Circuit City Stores, Inc., 71 F. Supp. 2d 1026, 1028 (N.D. Cal.
11 1999) (quoting Mangini v. F.R. Reynolds Tobacco Co., 793 F. Supp.
12 925, 927 (N.D. Cal. 1992)).

13 **III. DISCUSSION**

14 Plaintiff argues that her "motion should be granted because
15 OII has not joined in the removal." (Mot. Remand at 18:4-5.)
16 Defendant argues that the removal was proper for two reasons: (1)
17 that OII is a nominal party and (2) that OII has not been served.
18 (Opp. Mot. Remand at 1:13-14, 25.)

19 **A. Nominal Defendant**

20 Pursuant to 28 U.S.C. § 1446 "[w]hen a civil action is removed
21 solely under section 1441(a), all defendants who have been properly
22 joined and served must join in or consent to the removal of the
23 action." 28 U.S.C. § 1446(b)(2)(A). However, "the 'rule of
24 unanimity' does not apply to 'nominal, unknown or fraudulently
25 joined parties.'" United Computer Sys. v. At&T Info. Sys., 298 F.3d
26 756, 762 (9th Cir. 2002)(quoting Emrich v. Touche Ross & Co., 846
27 F.2d 1190, 1193 n.1 (9th Cir. 1988)). "A nominal defendant is a
28 person who 'holds the subject matter of the litigation in a

1 subordinate or possessory capacity as to which there is no
 2 dispute.' . . . As the nominal defendant has no legitimate claim to
 3 the disputed property, he is not a real party in interest." SEC v.
 4 Colello, 139 F.3d 674, 676 (9th Cir. 1998) (quoting SEC v. Cherif,
 5 933 F.2d 403, 414 (7th Cir. 1991)).¹ The removing party bears "the
 6 burden of proving a defendant is a nominal party. . . ." Shears v.
 7 Citimortgage, Inc., No. 14-cv-02689-TLN, 2015 WL 4393915, at *4
 8 (E.D. Cal. Jul. 15, 2015). "'Determining nominal party status is a
 9 practical inquiry focused on the particular facts and circumstances
 10 of a case,. . . ." Id. (quoting Hartford Fire Ins. Co. v.
 11 Harleysville Mut. Ins. Co., 736 F.3d 255, 260-261 (4th Cir. 2013)).

12 Here, Defendant claims that OII is a nominal defendant and
 13 therefore was not required to join in the removal. (Opp. Mot. Rem.
 14 at 10:5-6.) Defendant bases this conclusion on the fact that "OII
 15 is an inactive corporation with no assets," a fact that Plaintiff
 16 does not dispute. (Opp. Mot. Rem. at 12:18; Mot. Rem. at 1:18.)
 17 However, determinations of nominal status do not rest solely on
 18 whether a party is an active corporation with assets. A nominal
 19 defendant is a party to an action "'only as the holder of assets
 20 that must be recovered in order to afford complete relief; no cause
 21 of action is asserted against a nominal defendant.'" Gamrex, Inc.
 22 v. Schultz, No. 10-00380 JMS, 2010 WL 3943910, at *7 (D. Haw. Sept.
 23 9, 2010) (quoting Commodity Futures Trading Comm'n v. Kimberllynn
 24 Creek Ranch, Inc., 276 F.3d 187, 192 (4th Cir. 2002)). Here,

25
 26 ¹ For purposes of diversity, the Ninth Circuit has defined a
 27 nominal party "as one 'who has some immaterial interest in the
 28 subject matter of the lawsuit and who will not be affected by any
 judgment.'" Shears v. Citimortgage, Inc., 2015 WL 4393915 at *2
 (E.D. Cal. Jul. 15, 2015) (quoting Hartford Fire Ins. Co. v.
Harleysville Mut. Ins. Co., 736 F.3d 255, 260 (4th Cir. 2013)).

1 Plaintiff brings three causes of action against OII. Courts have
2 concluded that "where the complaint pleads substantive allegations
3 against and seeks money from" a party, they are not nominal.
4 Raissian v. Quality Loan Service Corp., No. CV-14-07969-BRO, 2014
5 WL 6606802, at *4 (C.D. Cal. Nov. 19, 2014); see Latino v. Wells
6 Fargo Bank, N.A., No. 11-cv-02037-MCE, 2011 WL 4928880, at *3 (E.D.
7 Cal. Oct. 17, 2011)).

8 Defendant has not carried it's burden to prove that OII is a
9 nominal party. Plaintiff alleges causes of action against OII and
10 seeks to recover from it. Defendant's "removal [was] procedurally
11 defective [because] there [was] a lack of 'unanimity' between co-
12 defendants." Hafitz v. Greenpoint Mortg. Funding, Inc., 652 F.
13 Supp. 2d 1050, 1052 (N.D. Cal. 2009) (quoting United Computer Sys.
14 Inc. v. AT&T Corp., 298 F.3d 756, 762 (9th Cir. 2002)).

15 **B. Service**

16 Defendant additionally argues that "OII's consent to the
17 removal [was] not required because Plaintiffs failed to properly
18 serve OII." (Opp. Mot. Rem. at 13:7-8). "All defendants who have
19 been 'properly . . . served in the action' must join a petition for
20 removal." Destifino v. Reiswig, 630 F.3d 952, 956 (9th Cir. 2011)
21 (quoting Emrich v. Touche Ross & Co., 846 F.2d 1190, 1193 n.1 (9th
22 Cir. 1988)). "The sufficiency of service of process before removal
23 from state court is determined under state law." Team Enters., LLC
24 v. Western Inv. Real Estate Trust, No. CV F 08-1050 LJO, 2008 WL
25 4367560, at *2 (E.D. Cal. Sept. 22, 2008).

26 California Code of Civil Procedure section 416.10 governs
27 service of process on a corporation. Section 416.10 provides: "[a]
28 summons may be served on a corporation by delivering a copy of the

1 summons and the complaint by any of the following methods: (a) To
2 the person designated as an agent for service of process. . . ."
3 Cal. Code Civ. Proc. § 416.10. "As long as the defendant receives
4 actual notice of the lawsuit, substantial compliance with the Code
5 provisions governing service of summons will generally be held
6 sufficient." Team Enters., LLC, No. CV F 08-1050 LJO, 2008 WL
7 4367560, at *3. Once the defendant challenges service, the
8 plaintiff bears the burden to show that service was sufficient.
9 Brockmeyer v. May, 383 F.3d 798, 801 (9th Cir. 2004).

10 Here, Defendants contend that "plaintiffs did not properly
11 serve OII." (Opp. Mot. Rem. at 14:7.) Plaintiff concedes as much.
12 In her Motion for Remand Plaintiff states, "OII was not properly
13 served prior to the filing of the Removal Petition." (Mot. Rem. at
14 19:13-14.) Plaintiff served OII on July 14, 2015, six days after
15 NBC filed the petition for removal. (Id. at 1.)² Even under
16 California's liberal substantial compliance standard, Plaintiff's
17 attempted service on OII is insufficient because Plaintiff failed
18 to prove that OII received actual notice of this lawsuit. For this
19 reason, OII was not required to join in the removal.

20 In her Reply brief, Plaintiff requests that the court "order
21 service by publication which will eliminate this NBC objection to
22 remand." (Reply to Opp. Mo. Rem. at 9:10-11.) However, properly
23 serving OII later will not invalidate the removal. 28 U.S.C. § 1446

24
25 ² Plaintiff served "OII's agent for service" in Delaware.
26 (Reply to Opp. Mot. Rem. at 8). Defendant argues that this was
27 ineffective service "because at the time OII was served it had
28 already been a void Delaware corporation for fifteen years. . . ."
(Opp. Mot. Rem. at 14:17-18.) However, the court need not address
this issue, as Plaintiff concedes that OII was not properly served
prior to NBC filing the removal petition.

1 only requires that "all defendants who have been properly joined
2 and served" to join in the removal. 28 U.S.C. § 1446(b)(2)(A). A
3 party that has not been properly served "'need not be joined' in a
4 petition for removal." Emrich, 846 F.2d at 1193 n.1 (quoting
5 Salveson v. Western States Bankcard Ass'n, 731 F.2d 1423, 1429 (9th
6 Cir. 1984)). Even if Plaintiff was able to properly serve OII, it
7 would not affect the validity of NBC's removal. See Lewis v. Rego
8 Co., 757 F.2d 66, 69 (3rd Cir. 1985) (" . . .once a case has been
9 properly removed the subsequent service of additional defendants .
10 . . . does not require or permit remand on a plaintiff's motion.").

11 **IV. CONCLUSION**

12 Although the Court concludes that OII is not a nominal
13 defendant, Plaintiff failed to show that she properly served OII.
14 For this reason, Plaintiff's motion to remand is denied.

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16 IT IS SO ORDERED.

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18 Dated: February 2, 2016



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20 DEAN D. PREGERSON
21 United States District Judge
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